



CLAYTON UTZ

GUIDE TO PROTECTING
FOREIGN INVESTMENTS

FOREIGN INVESTOR CHECKLIST

- ☑ Does the country in which the investment is made have an investment treaty with your country?
If not, can you structure your investment through a third country to obtain investment treaty protection?
- ☑ Does your investment fall within the scope of the investment treaty? Are you an 'investor' and is your commercial activity an 'investment' as defined by the treaty?
- ☑ What are the standards of protection afforded by the investment treaty?
 - national treatment;
 - most favoured nation treatment;
 - fair and equitable treatment;
 - compensation in the event of expropriation or nationalisation;
 - full protection and security;
 - compensation in the event of war or riot;
 - non-impairment by arbitrary and unreasonable measures;
 - the right to repatriate investments; and
 - the umbrella clause.
- ☑ Has the country of investment entered into any other investment treaties? If so, you may be able to take advantage of more favourable provisions contained in other investment treaties if your investment attracts 'most favoured nation' treatment.
- ☑ Ensure compliance with local laws. This includes registration and incorporation requirements, competition laws, etc.
- ☑ Consider including an arbitration clause in all of your contracts.
- ☑ Consider obtaining political risk and other insurance.
- ☑ If contracting with a State or State owned enterprise, consider the inclusion of the following provisions in your contract:
 - State waiver of sovereign immunity;
 - a declaration of State ownership of the enterprise; and
 - a 'change in law' or stabilisation clause.
- ☑ Obtain specialist legal advice prior to making the investment to ensure optimal structures for protection are put in place.

Contact Clayton Utz before you invest to ensure that your foreign investment gains maximum protection

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Foreword

Foreign direct investment (FDI) is continuing to grow in importance for Australian companies seeking to compete in the increasingly global market. Australian companies can take advantage of the many opportunities created overseas by the worldwide demand for infrastructure and commodities. Opportunities exist in particular in the energy, resources, transport and telecommunication sectors.

FDI is encouraged by most governments around the world for obvious reasons. Global FDI flows in this decade are more than double those of the previous decade, and have increased tenfold since the 1980s to an average of US \$1 Trillion per year. This growth is expected to continue in the long term, notwithstanding the effects of the global financial crisis. Indeed a number of countries, including Australia, have taken steps to overhaul their foreign investment legislation to further encourage FDI as a measure to combat the impacts of the crisis. As a result, many transnational corporations are optimistic about a swift recovery, and are continuing to pursue an international strategy to generate revenue and maintain their competitiveness.

However, prudent investors will not risk capital by investing in a foreign market unless the financial prospects are promising and the legal structure is sufficient to protect that investment.

The Clayton Utz *Guide to Protecting Foreign Investments* provides an easy-to-understand and yet comprehensive overview of the key legal and commercial issues that should be considered when planning FDIs.

The aim of this Guide is to highlight the free protection afforded to foreign investors under some 3,400 international investment treaties that currently exist around the world. This form of protection, while well known throughout Europe, Asia and the Americas, is often overlooked by Australian companies.

Maximising protection of your FDI requires careful consideration of many complex legal issues and strategic positioning at the very outset of your venture. The Clayton Utz International Arbitration (IA) team can advise on all aspects of foreign investment: whether this is in the form of general advice on the most effective ways to manage risks when investing overseas, or assistance in the resolution of disputes in foreign markets should the situation arise.

Foreign direct investments - overview

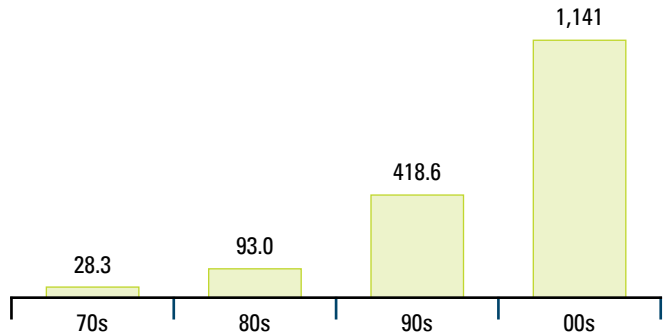
The term “FDI” commonly refers to the flow of capital, assets and other investments on a long-term basis by a resident-entity in one country into an enterprise in another country. It is usually carried out by an initial equity transaction, and may be followed up by other financial transactions and the reinvestment of earnings.

FDI is undertaken with the objective of establishing a longer-term relationship between the enterprises involved. The degree of influence on the management of the foreign investment distinguishes FDI from other types of investment. FDI is a form of active investment rather than a passive investment. It can include the acquisition of shares in a foreign entity, as well as offshore provisioning of corporate services, public-private partnerships, so called Greenfield and Brownfield investments, outsourcing, licensing and franchising.

There has been exponential growth in the amount of FDI outflows around the world over the past 30 years.

Average yearly global FDI outflows per decade

(in billions of US dollars)

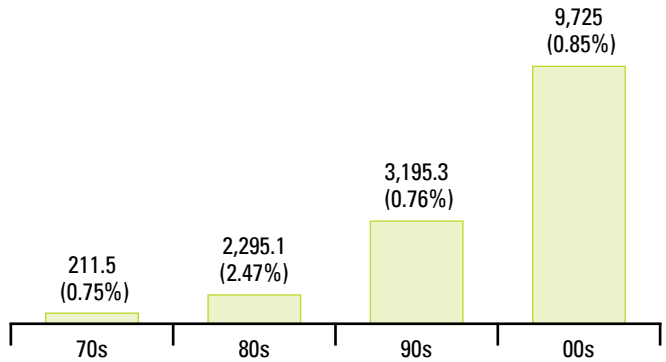


Source: UNCTAD Foreign Direct Investment Online Database

In the past decade, Australian companies have contributed approximately 0.85% of the world's total FDI.

Average yearly Australian FDI outflows per decade

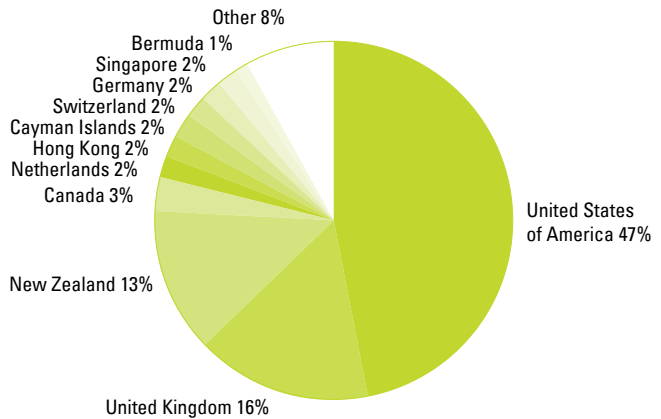
(in millions of US dollars and as a percent of global outflows)



Source: UNCTAD Foreign Direct Investment Online Database

Traditionally, a majority of Australian FDI has been invested in the United States, the United Kingdom and New Zealand.

Average Australian direct investment abroad



Source: ABS Catalogue 53520 - Table 5 (2001 - 2008)

Globally, the South-East Asia region is the third largest recipient of FDI, after Europe and North America, and is set to further increase its share. Transnational corporations are moving towards Asian countries as their regional preference for FDI because of the price of labour, the cost of business, the size of the local markets, the presence of suppliers and partners and the access to natural resources.

This places Australian companies in a strong position to benefit commercially from FDI by taking advantage of Australia's geographical proximity to South-East Asia and its abundance of natural resources. In fact, Australia's FDI within the region is already rising.

With more Australian FDI abroad, it is important for Australian companies to have a thorough understanding of the risks involved.

What are the common risks?

FDI is usually exposed to greater and different types of risk compared to those encountered in an investor's domestic market. Additionally, it may be harder to manage these risks when operating in a different legal system.

Some of the most common risks associated with FDI include:

- **FDI discrimination:** FDI may be discriminated against by the government of a host State attempting to protect its domestic industry. Such action may hinder, restrict or damage new and existing FDI.

Examples of FDI discrimination: The cancellation or request for renegotiation of contracts by a government or state entity; the cancellation of import or export licences; an inability to convert or transfer currency; or payment default by a government entity.

- **Political risks:** This includes arbitrary government action, such as a lack of due process in the local courts, misleading government conduct and poor government administration.

- **Global economic risks:** This includes exchange rate fluctuations, volatility of petroleum and raw material prices and the deterioration of the global economy.
- **Civil unrest:** Assets may be damaged, destroyed or lose significant value in times of war, armed conflict, revolution, civil riot or state of emergency.
- **Government instability:** The investment environment may become unfavourable or uncertain because of government instability.

Obviously, some of these risks, such as changes to the global economy, are unavoidable and should be factored in when planning the FDI. However, other risks, for example those arising from government actions, may be significantly reduced or even eliminated by taking advantage of international investment treaties.

How do investment treaties protect investors?

What are investment treaties?

An investment treaty is a legal agreement between two countries establishing reciprocal arrangements to encourage and protect foreign investment. In essence, it guarantees a minimum level of protection to foreign investors from one country (home State) investing in another country (host State).

The greatest attribute of investment treaties, from a commercial perspective, is that the protection afforded to investors is free.

What are the different types of investment treaties?

Investment treaties fall into two broad categories: Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs). Although not strictly an investment treaty by definition, some Free Trade Agreements (FTAs) contain provisions which provide investors with similar protection to that found in investment treaties.

Bilateral Investment Treaties (BITs)

A BIT is an agreement between two countries seeking to encourage and protect foreign investments between them. Australia has entered into a number of BITs.

Australia's BIT Partners		
Argentina	Indonesia*	Philippines*
China	Laos*	Poland
Czech Republic	Lithuania	Romania
Egypt	Mexico	Sri Lanka
Hong Kong	Pakistan	Turkey
Hungary	Papua New Guinea	Uruguay
India	Peru	Vietnam*

* These countries are also signatory to the AANZFTA (see page 10)

Multilateral Investment Treaties

Multilateral Investment Treaties are similar to BITs, except they are agreements between three or more countries.

Examples of MITs:

North American Free Trade Agreement (NAFTA): A multilateral trade agreement between the United States, Canada and Mexico.

Energy Charter Treaty: An international agreement signed by more than 48 State parties addressing matters of trade in energy materials, the protection of foreign investment within the energy industry, and the cross-border transit of energy flows. Although Australia has signed the treaty, it is yet to ratify it.

Free Trade Agreements (FTAs)

FTAs are agreements between two (bilateral) or more (multilateral) countries to form a free trade area by removing tariffs, quotas and preferences on most, if not all, trade between the countries.

Australia's FTAs		
ASEAN – Australia – New Zealand FTA	Australia – New Zealand Closer Economic Relations	Singapore – Australia FTA
Australia – Chile FTA	Australia – United States FTA	Thailand – Australia FTA

AANZFTA: The AANZFTA parties comprise the 10 ASEAN members (Burma, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam) together with Australia and New Zealand.

The AANZFTA does not impact upon the existing FTAs between Australia, Singapore and Thailand. Further, it should be noted that Australia and New Zealand concluded an agreement alongside AANZFTA, in which they agreed that Chapter 11 (Investment) of the AANZFTA does not create any rights or obligations between Australia and New Zealand.

In the event of any inconsistency between the AANZFTA and one of Australia's BITs with Indonesia, Laos, the Philippines and Vietnam, Australia will immediately consult with the respective signatory with a view to finding a mutually satisfactory solution.

Check that you come within the definition of an 'investor'.

Who qualifies as an investor?

For protection under an investment treaty, the person or company making the investment must qualify as an 'investor'. Most treaties define 'investor' as either a natural person or a company having the nationality of the home State. A company is usually defined as any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised under law. The definition may differ between each BIT and one should always check the exact requirements under the relevant BIT.

Although the method used to determine whether a company or person is 'foreign' varies across investment treaties, the party seeking to utilise the investment treaty must demonstrate that it is a national of one of the countries that is signatory to the treaty.

Nationality of a natural person

This is determined by an individual's citizenship, residence or a combination of both.

Nationality of a company

The issue of nationality is more complex in the case of companies. It can be determined by consideration of one or more of the following factors:

- **Place of incorporation:** The country of incorporation often provides a strong indication of a corporation's nationality. The registration of a foreign company in a country may not be sufficient.
- **Main 'seat' of business:** The main seat of business can also be used to determine a corporation's nationality. This is often the central place of administration.
- **Bond of economic substance:** A corporation may be required to show a substantial economic bond between itself and the country whose nationality it claims. This may include showing that effective control over the corporation is held by nationals of the State, or evidence of its involvement in economic activity within the State.

Nationality requirements in Australia's BITs			
Country	Place of incorporation	Main 'seat' of business	Bond of economic substance required?
Argentina	✓	✗	✗
China	✓	✗	✗
Czech Republic	✓	✗	✗
Egypt	✓	✗	✗
Hong Kong	✓	✗	✗
Hungary	✓	✗	✗
India	✓	✗	✗
Indonesia	✓	✗	✗
Laos	✓	✗	✗
Lithuania	✓	✗	✗
Mexico	✓	✗	✓
Pakistan	✓	✗	✗
Papua New Guinea	✓	✗	✗
Peru	✓	✗	✗
Philippines	✓	✓	✗
Poland	✓	✗	✗
Romania	✓	✗	✗
Sri Lanka	✓	✗	✗
Turkey	✓	✗	✗
Uruguay	✓	✗	✗
Vietnam	✓	✗	✗

Ensure that you qualify as an 'investor' under the relevant investment treaty before relying on the protection as the definition can vary between treaties. This is particularly important when seeking to take advantage of an investment treaty to which Australia (or your home State) is not a party. This is discussed in more detail on page 26.

Governments and other entities: It should be noted that government entities may come within the definition of an 'investor' for the purposes of an investment treaty in so far as they are acting in a commercial capacity. This is particularly important given the significant foreign investment activities of sovereign wealth funds. In addition to individuals and corporations, other entities, such as unincorporated associations and not-for-profit organisations, may also come within the definition of 'investor'. In all cases, care should be taken to consider the definition of 'investor' in the relevant investment treaty.

Managed Investment Funds: The structuring of some managed investment funds may mean that they do not qualify as an 'investor' under investment treaties that have a very narrow definition of 'investor'. See for example *Renta 4 S.V.S.A v Russian Federation*.

Your commercial activity must come within the definition of an 'investment' to gain protection.

What qualifies as an investment?

To be able to seek protection under an investment treaty, the commercial activity must qualify as an 'investment'. Investment treaties often extend the traditional definition of an 'investment' to include many activities that may not normally be considered an investment.

Investment treaties usually contain a general definition of the term 'investment' followed by a non-exhaustive list of specific examples.

The definition of 'investment' is usually very broad and most Australian BITs define 'investment' as including 'any kind of asset'.

Specific examples:

- Movable and immovable property and any other property rights such as mortgages, liens and pledges.
- Shares, stocks, bonds, debentures or any other kinds of participation in companies.
- Returns which are reinvested.
- Intellectual and industrial property rights, including rights with respect to copyright, patents, trademarks, trade names, technical processes, know-how and goodwill.
- Business concessions and any other rights required to conduct an economic activity conferred by law or under contract, including concessions to search for, extract, exploit or cultivate natural resources, and to manufacture, use and sell products.

Does the protection apply retrospectively?

Under some investment treaties protection is afforded to existing investments that were made before the treaty came into force. It is worth checking whether any investment made prior to the date on which the investment treaty came into force is protected. The treaties usually specify this.

The following table lists the application dates of Australia's investment treaties.

Application of Australia's BITs and FTAs on investments made before date of entry		
<p>◆ – applies irrespective of when the investment was made</p> <p>✚ – applies irrespective of when the investment was made, but does not apply to disputes that arose prior to the entry into force of the investment treaty</p>		
Country	Application	Date of entry into force
AANZFTA	✚	January 2010
Argentina	✚	11 January 1997
Chile [^]	◆	6 March 2009
China	After 21 December 1972	11 July 1988
Czech Republic	After 1 January 1950	26 June 1994
Egypt	✚	5 September 2002
Hong Kong	◆	15 October 1993
Hungary	After 31 December 1972	10 May 1992
India	◆	4 May 2000
Indonesia	Investments made in accordance with Law No 1 of 1967*	29 July 1993
Laos	After 1 January 1988	8 April 1995
Lithuania	◆	10 May 2002
Mexico	◆	21 July 2007
Pakistan	◆	14 October 1998
Papua New Guinea	◆	20 October 1991

Peru	+	2 February 1997
Philippines	◆	8 December 1995
Poland	After 1 January 1972	27 March 1992
Romania	+	22 April 1992
Singapore [^]	◆	28 July 2003
Sri Lanka	◆	14 March 2007
Thailand [^]	◆	1 January 2005
Turkey	+	25 June 2009
United States [^]	◆	1 January 2005
Uruguay	+	12 December 2002
Vietnam	After 1 January 1986	11 September 1991

[^] Free Trade Agreements.

* For investments made in Indonesia.

How does an investment treaty protect investors?

Investment treaties usually offer protection in three different ways:

- **Standards of protection for investors:** An investment treaty provides minimum standards for the treatment of foreign investors and their investments within the host State. These standards are described in detail in the section below.
- **Dispute resolution procedures:** Investment treaties provide a regime through which an aggrieved investor can take action directly against the host State in the event of a breach of the State's obligations under the investment treaty. In the past, an investor had to petition its own government to take diplomatic or legal measures against the host State, which made it very difficult for an investor to obtain relief. Today the most effective avenue is through investment treaty arbitration between the investor and the host State.

- **Compensate investors for breaches of the standards:**

An investment treaty provides means of compensation to investors for losses suffered as a result of any breach of a standard of protection offered to the investor by the investment treaty.

What protection do investment treaties provide?

The standards of protection provided by the different investment treaties can vary, as the treaties are negotiated individually between the contracting States. The following are examples of the most commonly used standards. The table on page 22 of this Guide lists the standards of protection afforded by Australia's BITs and FTAs.

National treatment

National treatment protection requires the host State to treat investors no less favourably than it treats its domestic investors. In this regard, a national treatment clause protects foreign investors from certain measures taken by host States to protect domestic companies in order to give them a competitive advantage over their foreign-owned competitors. This standard of protection covers regulatory measures that are expressly discriminatory as well as measures that are indirectly discriminatory or discriminatory in their effect.

Example: a special tax on foreign companies may be a discriminatory measure prohibited by a national treatment clause.

Most favoured nation treatment

Most favoured nation clauses require the host State to treat the investor and the investment at least as favourably as the investors and investments from other States are treated. Foreign investors should be aware of all investment treaties entered into by a host State so as to take advantage of more favourable provisions found in other treaties.

Example: In *Maffezini v Spain*, the Argentine investor was relieved of certain treaty requirements relating to the exhaustion of domestic remedies before bringing an arbitration claim under the Argentina-Spain investment treaty. This was because the treaty contained a most favoured nation clause that allowed the claimant to take advantage of a more favourable dispute resolution clause found in the Chile-Spain investment treaty.

NB: Some most favoured nation clauses have been interpreted more narrowly in other cases as applying only to substantive rights and not to procedural rights. (See *Plama Consortium v Bulgaria* and *Telenor Mobil Communications v Hungary*).

Fair and equitable treatment

This standard obliges the host State to afford the investor 'fair and equitable treatment'. The precise scope of this obligation is subject to constant development and its application depends largely on the facts and circumstances of each case. At a minimum, the host State is required to avoid subjecting the investor to arbitrary, discriminatory or fraudulent treatment, or treatment that would constitute a lack of due process or a denial of justice.

Affording fair and equitable treatment has also been interpreted to require the host State to maintain a stable business environment consistent with reasonable investor expectations. This may require the State to act in a manner that is consistent, transparent and free from ambiguity in its dealings with the foreign investor.

Example: States may be found to have violated the obligation to accord fair and equitable treatment in the following circumstances:

- **Cancellation of guarantees:** For example the cancellation of guarantees linking the Argentine peso to the US dollar (see *CMS v Argentina*).
- **Failing to provide a stable and predictable business environment:** A government may be held liable for failing to provide a stable and predictable framework for a foreign investor's business planning and investment (see *Occidental Exploration and Production Company v Ecuador*).

- **Lack of due process or a denial of justice in the domestic legal system:** This might amount to a breach of the fair and equitable treatment clause, for instance where a trial court permits the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant (see *Loewen v USA*).
- **Creation of legitimate expectations:** A government's decision to revoke a licence (or not to renew a permit) can amount to a breach of a fair and equitable treatment requirement. In one example, the host State had previously raised the investor's expectations that the licence would not be revoked (or would be renewed) and did not mitigate the negative economic effects suffered by the investor (see *Tecmed v Mexico*).
- **Discrimination** has been found to be a breach of a fair and equitable treatment clause when a host State failed to deal with an investor's proposals in an unbiased, even-handed, transparent and consistent way and refused to communicate with the investor in an adequate manner (see *Saluka Investments BV v Czech Republic*).
- **Mismanagement:** Even a State's improper handling of a disagreement between itself and an investor may lead to a breach of a fair and equitable treatment provision. In one example, the State maintained silence when there was evidence of such persisting and aggravating disagreement, failed to look at important communications and had a "systemic attitude not to address the need to put an end to negotiations that were leading nowhere" (see *PSEG Global v Turkey*).

Compensation in the event of expropriation or nationalisation

Where the investment treaty contains an expropriation or nationalisation clause, the foreign investment must not be arbitrarily expropriated or nationalised without the prompt payment of adequate compensation. The definition of expropriation is not limited to expropriation in the traditional meaning of the outright seizure of assets.

The term 'expropriation' has been interpreted broadly to include changes in law or policy that substantially detract from the value of an investment.

Example: the refusal of a licence required to operate a business has been found to be an expropriation as it has the effect of depriving the investor of the expected economic benefit of the property (see *Tecmed v Mexico*).

Arbitral tribunals have also recognised that a series of individual acts which when considered separately do not constitute an expropriation, can amount to a 'creeping expropriation' when considered as a whole.

Example: a ban on the sale or transfer of manufacturing licences by bankrupt or failing automakers, thus restricting their rights to transfer ownership or enter into strategic alliances may amount to a 'creeping expropriation'.

Most investment treaties entered into by Australia only permit expropriation when it is non-discriminatory, carried out for a public purpose under due process of law, and is accompanied by the prompt payment of adequate and effective compensation. What constitutes a 'public purpose' is an issue that remains open to interpretation and depends on the circumstances of each case.

Full protection and security

Under this standard of protection, a host State is required to provide full protection and security to the investor or the investment, as is reasonable in the circumstances. Arbitral tribunals have interpreted such clauses both broadly and narrowly. On a broad interpretation, full protection and security has been found to apply to more than just the 'physical security of an investor or its property' and has been determined to include harassment where there may be no physical damage. On a narrower construction, the clause has been interpreted as requiring the State only to protect the 'physical integrity of an investment'. Therefore, depending on the interpretation applied, a State will not necessarily be liable for damage caused to an investment by a third party.

Compensation in the event of war or riot

This standard of protection offers foreign investors compensation for investment losses caused by war or other armed conflict, revolution, state of national emergency, civil disturbance, or similar events. The host State is required to treat the foreign investor no less favourably with regard to compensation, restitution or indemnity than it treats its own or other foreign investors.

Example: It has been held that a host State must compensate an investor for the losses caused to an investment arising from a military operation by government forces against an insurgent group (see *Asian Agricultural Products v Sri Lanka*).

Non-impairment by arbitrary and unreasonable measures

Under this standard of protection, the host State has the obligation not to impair by unreasonable, arbitrary, or discriminatory measures, the management, maintenance, use, enjoyment, sale and liquidation of protected investments. It is a standard of protection that is closely related to the obligation to accord fair and equitable treatment, and is often considered together with that standard.

The right to repatriate investments

Foreign investors usually have the right to repatriate investments and returns. This includes the right to transfer an investment and its returns into freely convertible currency. This right is especially important in times of economic crisis.

The umbrella clause

Umbrella clauses appear in many investment treaties and are designed to create a reciprocal obligation between States to observe any other obligations (including contractual obligations, and obligations that exist as a matter of that State's domestic law) which they have entered into with the investors from the other State. If, for example, the State breaches its contract with the investor, then through the operation of the umbrella clause this breach may be elevated to the status of a breach of an investment treaty obligation, and entitle the investor to take direct action against the State under the dispute resolution procedure provided by the treaty.

What standards of protection do investors have under Australia's BITs and FTAs?

The table below lists the types of standards of protection afforded by Australia's BITs and FTAs.

Country	National treatment	Most favoured nation	Fair and equitable treatment	Expropriation or nationalisation	Full protection and security	War or riot	Non-impairment	Repatriate investment	Umbrella clause
<i>Free Trade Agreements</i>									
AANZFTA	✓	✗	✓	✓	✓	✓	✗	✓	✗
Chile	✓	✓	✓	✓	✓	✓	✗	✓	✗
Singapore	✓	✗	✗	✓	✗	✓	✗	✓	✗
Thailand	✓	✓	✓	✓	✓	✓	✗	✓	✗
United States	✓	✓	✓	✓	✓	✓	✗	✓	✗
<i>Bilateral Investment Treaties</i>									
Argentina	✓	✓	✓	✓	✓	✓	✓	✓	✗
China	✗	✓	✓	✓	✓	✓	✓	✓	✓
Czech Republic	✗	✓	✓	✓	✓	✓	✓	✓	✗
Egypt	✗	✓	✓	✓	✓	✓	✓	✓	✗
Hong Kong	✗	✓	✓	✓	✓	✓	✓	✓	✓
Hungary	✗	✓	✓	✓	✓	✓	✓	✓	✗
India	✓	✓	✓	✓	✓	✓	✓	✓	✗
Indonesia	✗	✓	✓	✓	✓	✓	✓	✓	✗

Country	National treatment	Most favoured nation	Fair and equitable treatment	Expropriation or nationalisation	Full protection and security	War or riot	Non-impairment	Repatriate investment	Umbrella clause
<i>Bilateral Investment Treaties</i>									
Laos	x	✓	✓	✓	✓	✓	✓	✓	x
Lithuania	x	✓	✓	✓	✓	✓	✓	✓	x
Mexico	✓	✓	✓	✓	✓	✓	x	✓	x
Pakistan	x	✓	✓	✓	✓	✓	✓	✓	x
Papua New Guinea	x	✓	✓	✓	✓	✓	✓	✓	✓
Peru	x	✓	✓	✓	✓	✓	✓	✓	x
Philippines	x	✓	✓	✓	x	✓	x	✓	x
Poland	x	✓	✓	✓	✓	✓	✓	✓	✓
Romania	x	✓	✓	✓	✓	✓	✓	✓	x
Sri Lanka	x	✓	✓	✓	✓	✓	✓	✓	x
Turkey	✓	✓	✓	✓	✓	✓	✓	✓	x
Uruguay	x	✓	✓	✓	✓	✓	✓	✓	x
Vietnam	x	✓	✓	✓	✓	✓	✓	✓	x

The Australian New Zealand Closer Economic Relations Agreement does not contain specific provisions on foreign investment. Investors of each country are subject to the general foreign investment policies and requirements of the other country. Nevertheless, both countries are committed to *“ensuring that investment review procedures remain at least as liberal as existing practice.”* See www.dfat.gov.au for more information.

What issues should an investor consider before making a foreign direct investment?

Investment treaties are an effective legal mechanism to protect FDI against the risks inherent in foreign markets. Prior to making the FDI an investor should consider what protection is available under any investment treaties that may be applicable, whether or not to take out political risk insurance, and the tax implications of the investment.

Investment treaty protection

A prudent investor will take steps to gain maximum protection for their investment. This is particularly important if the investment is made in a volatile, developing or emerging market. Ensuring that the investment is protected under an investment treaty should be the first step to mitigate foreign investment risk.

If the host State has entered into an investment treaty with Australia (or your home State), your FDI will be protected under that treaty subject to the requirements discussed earlier on pages 10 - 14. The same, of course, applies if you are a foreign investor in Australia, and there is an investment treaty in place between your home State and Australia. As noted earlier, Australia has entered into a number of BITs and FTAs, which are listed on pages 8 and 9.

You should also be aware of any more favourable provision contained in other investment treaties entered into by the host State. The reason for this is that if the relevant BIT under which your investment is protected contains a 'most favoured nation' clause the host State is required to provide at least the same level of protection to your investment as it provides to investments from other countries. This clause has been discussed in the preceding section (see page 17).

Understanding these different provisions can be complex and even minor errors can sometimes prove costly. For peace of mind, and to ensure that your investment is covered by the best protection available under any applicable investment treaty, we recommend that you consult our expert advisers before finalising your investment.

You may still be able to gain protection under an investment treaty even if your home State has no investment treaty with the host State.

Investing in countries not party to an investment treaty with Australia (or your home State)

There may be circumstances where the host State of your investment has not entered into an investment treaty with your home State, be it Australia or another country. The good news is that you may still be able to obtain investment treaty protection.

This may be achieved by structuring your investment through a third country that has entered into an investment treaty with the host State. In this way, you can make use of the protection available under that investment treaty to protect your investment in the host State.

Example: An Australian company wishes to contract with the Ghanaese Government to build, operate and maintain a power plant in Ghana. Ghana has not entered into an investment treaty with Australia. The company may gain treaty protection under the Ghana-India BIT by operating its investment through India. Its Indian operations may also be protected by the Australia-India BIT.

If you decide to structure your investment through a third country, you may find it favourable to select a country that not only has a BIT with the host State but also with your home State so as to give you additional protection for your investment vehicle in that third country. However, whether or not an investment through a third country into the host State is covered by the BIT between the host State and the third country largely depends on whether the investment vehicle used in the third country satisfies the nationality requirements for being an 'investor' from the third country into the host State. Under some BITs it may not be sufficient to merely incorporate a company in the third country through which the investment flows into the host State. A stronger economic bond within the third country may be required (please see the table on page 12 of this Guide for more information).

Page 52 of this Guide contains a list of BITs entered into by Australia's major trading partners and FDI recipients. This list may be useful to select a third country through which an investment into a host State can be undertaken.

Political Risk Insurance (PRI)

A further way of managing foreign investment risk is to obtain Political Risk Insurance. The risks to which this type of insurance respond are, in principle, government or politically related risks, where repudiation or frustration of a commercial relationship or loss of the value of an investment comes about not through commercial or market-related factors, but as a result of politically motivated interference by the host State, their agents, groups or individuals.

As with any type of insurance, there is a variety of policies on the market that cover losses occurring from different types of events. It is up to the individual investor to decide which policy is most suitable for the particular circumstances.

Policies can be obtained to cover damages arising from events such as political violence, civil unrest, expropriation, nationalisation, confiscation, terrorism, licence cancellation, government frustration or repudiation of contracts, governmental interference, inconvertibility of foreign currency and wrongful calling of contract bonds.

There can be a significant overlap in the protection offered by PRI and that which is afforded under investment treaties. In fact, PRI will often be easier and cheaper to procure where there is a BIT in place between the investor's home State and the host State. The reason why a company may wish to obtain PRI for risks that may be protected by an investment treaty is to ensure a quick and secure payment of compensation when damage is caused by a covered event, rather than pursuing a claim under an investment treaty which may be time consuming and expensive.

Examples of Political Risk Insurance policies

PRI policies vary greatly in respect of the types of risks they cover. The following are some of the most common:

Confiscation Expropriation Nationalisation (CEN) policies: these policies protect the investor where the loss results directly from defined political and social perils.

Contract Frustration (CF) and Contract Repudiation (CR) policies: these types of policies are broader than CEN policies and can provide some cover in respect of the commercial or credit risk of States and their entities where default may be caused by simple economic mismanagement.

Investor-State Arbitration Award default: this type of policy can protect an investor against the risk of a host State defaulting on an award made against it through investor-State arbitration (discussed on page 32 onwards).

PRI policies can be quite technical in their language and structure, and care needs to be exercised in matching the terms to the underlying transaction, project or financing documentation, and to ensure that the coverage operates as intended. Issues such as warranties, acceleration of loan repayment obligations, calculation of reference rates of exchange for currency inconvertibility cover and illegality of Government action under local or international law all require careful attention and specialist assistance is recommended.

When choosing the right PRI policy it is important to check that it allows the investor, in case of a covered event, to claim directly under the PRI policy without first resorting to investment treaty relief. In such circumstances, the insurer is likely to subrogate the investor's treaty rights and commence proceedings under the investment treaty dispute resolution procedures to recover against the host State. The right of subrogation is permissible under most Australian BITs.

Contractual safeguards

Forward thinking at the drafting stage of an investment agreement allows the opportunity to reinforce the protection provided under the relevant investment treaties.

Contracting with a State or State-owned enterprise

It is not unusual for foreign investors to contract directly with the host State or with a government-owned entity for the purposes of carrying out an investment. There are a few additional issues that one should consider in these circumstances. Ideally, the contract should include an express waiver of sovereign immunity by the government or government entity to ensure accountability for breaches of contract by the host State.

When contracting with a State enterprise, your contract should also include a declaration of State ownership of the State enterprise. This will prevent a State from avoiding liability for breaches of an investment treaty. In the past, some States have successfully argued that a contracting entity, which the foreign investor thought was State-owned, was in fact not a State enterprise.

Change in law or stabilisation clause

A 'change in law' or 'stabilisation' clause is a provision that may be included in contracts between investors and host States to address the issue of changes in law in the host State during the life of the investment. From an investor's perspective, such clauses are additional risk-mitigation tools to protect investments from the application of arbitrary or discriminatory amendments to relevant legislation, such as the applicable tax regime.

Arbitration clause

An arbitration clause provides that disputes arising under the contract are to be resolved through arbitration instead of litigation. Arbitration is a valuable process especially for foreign investors and has many benefits such as flexibility, neutrality of forum, confidentiality, efficiency, finality and most importantly, the enforceability of the award throughout most of the world. The Clayton Utz *Guide to International Arbitration* provides detailed information on international arbitration and can be downloaded from the International Arbitration section of the Clayton Utz website: www.claytonutz.com.

Tax structuring

The careful planning and structuring of your FDI is crucial to manage any tax exposure. The following should be considered in relation to a FDI.

Choice of vehicle

The way in which the investor structures the investment can have a direct impact on the tax liabilities arising from the investment. Taxes may be borne in the host State, the home State, a third country or a combination of those depending on the investment structure adopted. The relevant taxes which need to be considered include income tax, capital gains tax, stamp duty or transactional taxes, and goods and services or value added taxes.

Where a FDI is made through a foreign entity, consideration should be given to integrity rules in our law that can tax an Australian investor's income derived from the foreign entity despite the income not being distributed to Australia. Appropriate planning should be undertaken to ensure that these complex rules are managed effectively.

Repatriation of returns to Australia

Returns may be repatriated to Australia by various means, for example dividends, interest, royalties, returns of capital, and services fees. Withholding taxes or other foreign taxes may be applicable on the amounts repatriated.

Relief for foreign taxes borne

It is important to manage any potential double taxation arising from foreign investment. Relief from double taxation may be available via exemption from Australian tax or credit for the foreign tax paid. Australia has also entered into tax treaties with a number of countries, which operate to avoid double taxation and allocate taxing rights. You can find more information about these treaties on the Australian Tax Office website: www.ato.gov.au.

Credit for foreign tax: An Australian investor may be entitled to a tax offset for foreign tax paid on an amount included in the investor's Australian taxable income.

How can an investor enforce its rights?

There are different ways a foreign investor may enforce its rights. So far, this Guide has concentrated on the rights and protection available under investment treaties. In addition, recourse may also be available on the basis of any direct contractual relationships that the investor has entered into in respect of the investment. These contractual rights differ from those under the investment treaty in that they have been established and negotiated directly between the investor and its contracting partner and as such depend on the bargaining power of each party.

In the case of a breach of contractual obligations, the investor will need to pursue its claim through the courts or in accordance with the dispute resolution process that has been agreed between the parties.

In contrast, when a breach of an obligation under an investment treaty occurs, the investor may invoke the dispute resolution process designated in the investment treaty.

Contractual rights

The enforcement of contractual rights is subject to the dispute resolution procedure prescribed in the contract. Ideally the contract will contain an arbitration clause, as it is a more effective mechanism for resolving international disputes.

In the absence of a dispute resolution procedure specified in the contract, a party will have to resort to the courts of the host State or any other courts that may have jurisdiction. Either option may cause difficulties in achieving a quick and enforceable outcome. On the one hand, there is the often-perceived disadvantage of litigating in foreign courts (especially if States or State entities of that jurisdiction are involved). On the other hand litigating on home ground may cause difficulties in enforcing the judgment in the courts of the host State.

Breach arising from a contract with a State: In certain circumstances an investor may be able to use the dispute resolution procedures under the investment treaty in respect of a contractual breach by a State. This may be possible if the investment treaty contains an *umbrella clause* requiring the State to observe the particular obligations owed to the investor.

Investment treaty rights

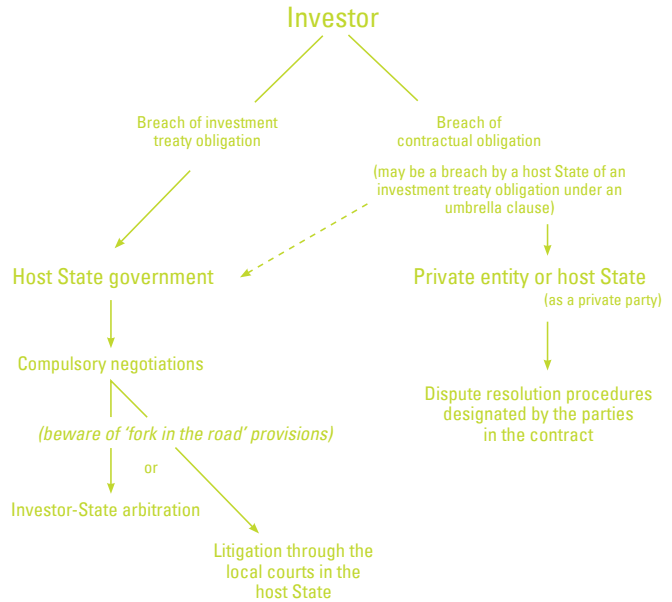
Rights arising under investment treaties are different from contractual rights. Treaty rights arise from the standards of protection agreed between the host State and the investor's home State. The particular rights and standards of protection have been discussed previously in this Guide on pages 16 - 23.

A breach by the host State of its obligations under the investment treaty allows the investor to take direct action against that State. This is a significant right afforded to investors.

Dispute resolution procedures

Most investment treaties contain dispute resolution procedures to be followed in the event of an alleged breach by the host State of its treaty obligations. Nearly all Australian BITs require the investor and the host State to enter into compulsory negotiations. If these fail, the aggrieved investor can usually elect to pursue relief through the domestic courts of the host State or through investor-State arbitration. Some investment treaties contain 'fork in the road' provisions, which require the investor to make an election as to whether it wants to pursue its claim through litigation in the courts or by way of investor-State arbitration under the treaty. Thus, particular care should be taken before the investor commences court proceedings as that choice may prevent it from subsequently referring the dispute to investor-State arbitration later on.

Enforcement of investor rights



You can bring an action directly against the government of a State for a breach of the investment treaty

Investor-State arbitration

Investor-State arbitration is the preferred method of dispute resolution between an investor and a State. Investor-State arbitration has addressed many of the concerns faced by investors litigating in a host State, as it allows an independent arbitral tribunal to resolve a dispute and make an internationally enforceable award.

Some of the advantages for the investor include gaining access to an effective international remedy which may be less expensive and more efficient than litigation. Parties may also select the members of the arbitral tribunal. This ensures neutrality and the appointment of decision-makers with the requisite expertise to resolve the dispute.

Investor-State arbitration is discussed in the following section.

Resolving investment disputes through investor-State arbitration

What is investor-State arbitration?

Investor-State arbitration is a dispute resolution process between the investor and the host State before a privately appointed tribunal. Nearly all investment treaties allow an aggrieved investor to elect to resolve an investment treaty dispute through investor-State arbitration.

This section will discuss the different aspects and procedural stages of investor-State arbitration. For additional information on international arbitration more generally, please refer to the Clayton Utz *Guide to International Arbitration* which can be downloaded from the International Arbitration section of the Clayton Utz website: www.claytonutz.com.

Arbitral institutions

Arbitration between the investor and a host State may take place under the auspices of an arbitral institution, which provides the procedural rules as well as administrative support to the parties and the tribunal.

One of the most well known arbitral institutions for the administration of investment treaty arbitrations is the International Centre for Settlement of Investment Disputes (ICSID) (discussed in detail below). However, other arbitral institutions, despite not being specifically created for the administration of such disputes, are also used depending on what has been agreed in the investment treaty.

These include, for example, the Permanent Court of Arbitration (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), and the International Court of Arbitration of the International Chamber of Commerce (ICC).

Ad hoc arbitration

Some arbitrations are conducted without the administrative support or supervision of an arbitral institution. These are referred to as 'ad hoc' arbitration. In these circumstances, and if the parties agree, the arbitration is often governed by the UNCITRAL Arbitration Rules.

ICSID

What is ICSID?

ICSID is an autonomous international institution established under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Its primary purpose is to provide facilities for conciliation and arbitration of international investment disputes. A list of signatory countries is provided on page 52 of this Guide.

ICSID has its own arbitration rules that are designed to specifically cater for investor-State arbitrations.

Key features of ICSID arbitration

- **The World Bank factor:** ICSID is a member of the World Bank Group and is widely supported by the international community. States have international obligations under the ICSID Convention including the obligation to recognise and enforce awards rendered under the ICSID Convention and the ICSID Rules.
- **Expertise and neutrality of the arbitral tribunal:** The parties are free to appoint the members of the arbitral tribunal (either a sole arbitrator or any uneven number of arbitrators). In addition, the majority of arbitrators must be nationals of States other than the host State or the investor's home State, unless the parties have specifically agreed on the composition of the tribunal. This protects the neutrality of the tribunal.
- **Administrative support:** The ICSID Secretariat offers extensive administrative support to ICSID arbitrations and conciliations. This includes support for the initiation and conduct of ICSID proceedings, the constitution of arbitral tribunals, as well as administering the proceedings and costs of each case.
- **Low fees:** ICSID charges a fixed administration fees (the costs are listed below). Some of the other institutions charge an administrative fee based on a percentage of the total amount in dispute.

- **High enforceability rate of ICSID awards:** Awards must be recognised and enforced by States that have ratified the ICSID Convention as if they were the final judgement of a domestic court in that State. States often voluntarily comply with awards rendered under the ICSID Convention, probably because of the powerful support of the World Bank, which is behind ICSID.
- **Protection against national courts:** The local courts of States that have ratified the ICSID Convention are not permitted to entertain applications that the award be set aside. An award may only be annulled on narrow grounds by an Annulment Committee established under the ICSID Convention, as discussed below.

What are the costs and duration?

ICSID Schedule of Fees (as of 1 January 2008 in US\$)	
Item	Fee (US\$)
Lodging requests for arbitration	\$25,000
Request for supplementary decision, rectification, interpretation, revision or annulment of an award	\$10,000
Expenses reasonably incurred by arbitrations performed in connection with proceedings	\$3,000 per day + direct expenses reasonable incurred + travel expenses
Administrative Charges	\$20,000 upon constitution of tribunal and per year thereafter
Expenses if tribunal is located away from ICSID	\$1,500 per day + reimbursement of travel and other expenses of the Secretary

ICSID additional facility rules

ICSID has a set of additional facility rules allowing the ICSID Secretariat to administer certain types of proceedings that fall outside the scope of the ICSID Convention between States and foreign nationals. These include:

ICSID can still be used even if the host State is not party to the ICSID Convention

- Dispute resolution proceedings for the settlement of investment disputes between a State and a national of another State, where one of the States concerned is not a signatory State to the ICSID Convention.
- Dispute resolution proceedings for the settlement of a dispute not directly arising out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a signatory State to the ICSID Convention.
- Fact-finding proceedings.

Arbitration procedure

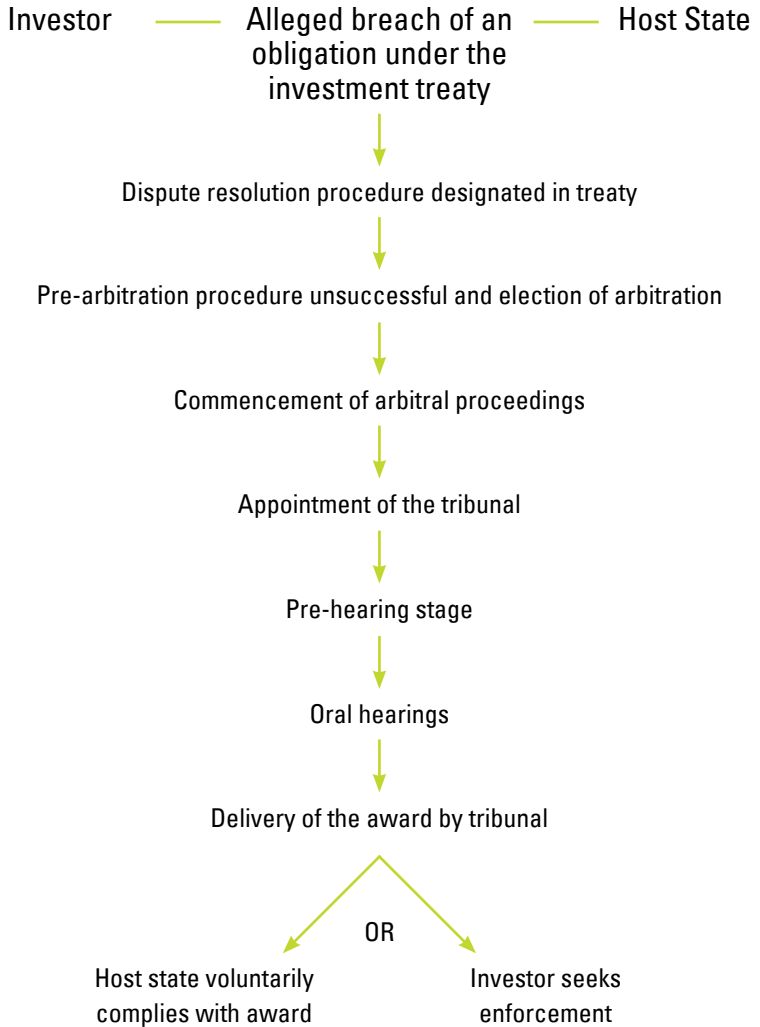
When a dispute arises between an investor and the host State that cannot be resolved through negotiations, commencing investor-State arbitration is usually the best way to proceed. To commence proceedings, an investor must follow the procedures provided for by the investment treaty that governs their investment. Normally the investor must elect to resolve the dispute through ICSID arbitration or litigation.

Be aware of fork-in-the-road provisions

The choice is usually final and cannot be changed at a later stage. Therefore, it is important not to initiate any proceedings in the local courts of the host State if you are considering investor-State arbitration.

The following information applies more to institutional arbitrations (such as ICSID arbitrations) rather than ad hoc arbitrations. The latter essentially follows the procedural process that has been agreed between the parties.

Investor-State arbitration procedure



Commencing proceedings

The arbitration proceedings commence with the investor submitting its 'request for arbitration' (or 'notice of arbitration') to the arbitral institution. The request for arbitration contains information about the relevant issues in dispute, the identity of the parties and their consent to arbitration. The State party's consent to arbitration is commonly included in the investment treaty, unless the treaty does not specify arbitration as a dispute resolution mechanism. The institution will send a copy of the request to the State party.

Commencing ICSID Arbitration: the Secretary-General will register the request unless he or she determines that the dispute is manifestly outside the jurisdiction of the institution. A party may still challenge the jurisdiction of an arbitral tribunal at a later stage.

Doug Jones,
head of Clayton
Utz' International
Arbitration Group,
is "described as 'a
leading light for Asia-
Pacific arbitration
work'."

Chambers Asia, 2009

Appointment of the tribunal

One of the benefits of arbitration over litigation is that the parties are able to choose their arbitrators. The procedure for the appointment can vary slightly under the different arbitration rules. Under the ICSID Rules, for example, although the parties may appoint the arbitrators from the ICSID panel of arbitrators, they are not bound to do so. Each party is to appoint one arbitrator, and the third arbitrator is selected by the two party appointed arbitrators. Most arbitrations are conducted by either one or three arbitrators, however any uneven number of arbitrators is usually allowed.

Our team is able to assist in recommending arbitrators with appropriate qualifications and experience.

Pre-hearings

Prior to the hearing taking place, the parties and the tribunal will usually consult to determine the procedure of the arbitration. Some of the issues discussed include:

- the language to be used;
- the number and sequence of pleadings and the time limits within which they are to be filed;

- the scope of further written submissions required;
- the number of copies of documents desired by each party;
- whether to dispense with written or oral procedure;
- the manner in which the costs are to be apportioned; and
- the way proceedings are recorded.

A pre-hearing conference may also be held to arrange for exchange of information and to determine uncontested facts. This assists the efficiency of the arbitration.

Hearings

The tribunal will hear submissions from the parties and any evidence from any witnesses and experts. The procedure adopted for the hearing may differ significantly depending on the arbitrator as well as the procedure agreed between the parties.

Participation in hearings by non-parties

Under the ICSID Rules, a tribunal may allow other persons besides the parties, such as persons with a significant interest in the dispute, to attend or observe the hearings. This is subject to any objections raised by the parties. However, ICSID arbitrations may be conducted entirely ‘behind closed doors’ at the request of either party.

ICSID rules permit a tribunal to allow a person or entity who is not party to the dispute (a non-disputing party, or ‘amicus curiae’) to file a written submission. The parties will be given an opportunity to present their observations in form of a so called ‘amicus brief’.

Making and delivering the award

After the written and oral phases of the arbitration proceedings, the tribunal delivers its decision in the form of an award.

The tribunal decides questions by a majority of votes. The award will be in writing and signed by the members of the tribunal who voted for it. In order to be final, the award must deal with all questions submitted to the tribunal and state the reasons upon which it is based.

ICSID may not publish the award without the consent of the parties.

Final and binding nature of ICSID awards

The ICSID Convention provides that an award shall be binding on the parties and shall not be subject to any appeal or any other remedy except as provided for in the ICSID Convention.

Post-award procedures

The ICSID Convention allows for the:

- interpretation;
- revision; and
- annulment

of an award provided certain requirements are met.

A party may request the 'interpretation' of the award if there is a dispute between the parties as to the meaning or scope of the award.

A party may request a 'revision' of the award only on the ground that it has discovered a fact that would decisively affect the award, and which was unknown to both the party and the tribunal at the time the award was made, provided that the party's ignorance of the fact was not due to negligence.

Revision of an ICSID award: An application must be made to the Secretary-General within 90 days of discovering the fact and within three years after the rendering of the award.

The 'annulment' of an award, in whole or in part, is only possible on the following limited grounds under the ICSID Convention:

- the tribunal was not properly constituted;
- the tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to state the reasons on which it is based.

Annulment of an ICSID award: An application for annulment must be made within 120 days after the award was rendered (or 120 days after discovery of particular corruption) and within three years of the award being rendered. Applications for annulment are considered by a new tribunal constituted for that purpose.

Enforcing the award

The process for enforcement of an arbitral award will vary depending on whether or not it is an ICSID Award.

Enforcing an ICSID Award: An ICSID award is binding on the parties and is not subject to any appeal or other remedy except those specifically provided for under the ICSID Convention (see above). Under the ICSID Convention a host State is obliged to recognise and enforce the award 'as if it were a final judgment' of a court in that State. A list of countries that are signatories to the ICSID Convention is included at the end of this Guide.

Enforcing a non-ICSID Award: Investor-State awards that are not rendered under the ICSID Convention (for example those rendered under the UNCITRAL Rules) can usually be enforced under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

It is usually open to an investor to seek enforcement of the award in a country other than the host State (within which the host State has assets) if that country is also a signatory to the ICSID Convention or the New York Convention as the case may be.

Interestingly, around 90% of awards against States are reportedly complied with. Compliance in these circumstances often includes the renegotiation of contracts rather than the State paying damages to the investor.

Investing in Australia

Australia is an excellent destination for FDI. Australia attracts around 1% of global FDI inflows and is ranked in the world's top 22 countries with the greatest potential for FDI. Some of Australia's industries with the greatest opportunities for FDI include the minerals and resources, financial services, clean energy, advanced manufacturing, agribusiness, biotechnology, research and development, carbon capture and storage, construction and transport sectors. Additionally, Australia is an effective launching pad for companies seeking to invest in Asia.

Australia is a very stable and resilient economy with a well regulated market and an excellent legal framework. The rule of law in Australia is strong and, as such, foreign investors investing in Australia will be less likely to face most of the issues raised previously in this Guide. Foreign investors may find the following overview of the domestic legal regime governing foreign investments in Australia useful.

Law governing foreign investments

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) regulates foreign investments made in Australia as well as acquisitions and takeovers of Australian companies by foreign entities.

The Act requires certain types of investments to be approved by the Foreign Investment Review Board (FIRB). It also gives the Treasurer of Australia the power to reject a proposed investment where it is in the national interest to do so.

Approval by FIRB is required when a substantial interest is proposed to be held by a foreign person or corporation. A substantial interest exists when a single foreigner (including a corporation) has 15% or more of the ownership or several foreigners have 40% or more in aggregate of the ownership of any corporation, business or trust.

There are also certain types of proposals over a monetary threshold that require notification to the FIRB irrespective of whether a substantial interest is held by a foreign person or corporation. These include:

- acquisitions of substantial interests over A\$219 million for private foreign investments in Australian businesses and A\$953 million for United States investments in non-sensitive sectors (sectors including those not related to the media, telecommunications, transport, the supply of human resources or military);
- certain investments in the media sector;
- takeovers of off-shore companies that have Australian subsidiaries or assets valued over A\$50 million or where the value of the Australian subsidiaries or assets is more than half of the value of the global assets of the target company;
- direct investments by foreign governments or their agencies;
- certain acquisitions of interests in urban land; and
- proposals where any doubt exists as to whether the acquisition is notifiable.

These numbers, values or thresholds are as at 1 December 2009.

Industry specific laws

There are specific regulations and laws governing foreign investments for certain Australian industries. The following table lists some of these laws and regulations:

Laws governing foreign investment in specific Australian industries	
Industry	Applicable Legislation
Airports	<i>Airports Act 1996</i>
Banking	<i>Banking Act 1959</i> <i>Financial Sector (Shareholdings) Act 1998</i>
Civil Aviation	<i>Air Navigation Act 1920</i> <i>Foreign Acquisitions and Takeovers Regulations 1989</i>
Media	<i>Broadcasting Services Act 1992</i> <i>Foreign Acquisitions and Takeovers Regulations 1989</i>
Shipping	<i>Shipping Registration Act 1981</i> <i>Foreign Acquisitions and Takeovers Regulations 1989</i>
Telecommunications	<i>Foreign Acquisitions and Takeovers Regulations 1989</i>

Working with Clayton Utz to protect your foreign investment

“Australian firm Clayton Utz houses a number of world-renowned arbitrators”

Chambers Global 2008

Clayton Utz recognises that it is important for our clients to be able to access trusted legal advice no matter where they are in the world. Our team of internationally experienced and commercially-minded professionals and our strong relationships with leading firms around the globe means that our clients receive the best possible advice and support, wherever they do business.

Before you invest

Given our expertise across a number of different practice areas, we can work closely with you to achieve your commercial outcomes. We can advise you on:

- structuring your foreign investment;
- efficiently managing your risk exposure;
- effectively negotiating any agreements relating to your investment; and
- drafting relevant dispute clauses in your international contracts.

Resolving disputes

Complex cross border transactions will sometimes lead to disputes. If a dispute arises, we are dedicated to advising clients on how to get the best outcome from any dispute resolution process and help you navigate the potentially complex terrain at both national and international levels. We also advise and represent clients from the preliminary stages of the dispute resolution process through to the final resolution of the dispute and the enforcement of awards before national and international courts.

In particular we can advise you on:

- commencing arbitral proceedings;
- understanding the arbitral process;
- commencing litigation in the host State;
- appointing appropriate arbitrators; and
- enforcing arbitral awards.

“A definite leader... The firm is recognised for working closely with clients to achieve successful and commercial outcomes in relation to the often significant and complex transactions undertaken both home and globally.”

Chambers Global 2007

“This Australian firm is renowned for its work as counsel and as arbitrator.”

Chambers Asia 2009

The Clayton Utz team

Our International Arbitration and Foreign Investment Protection team contacts are listed on the inside back cover; please feel free to contact them if you require foreign investment advice or wish to learn more about our service offerings. Alternatively, please visit the International Arbitration section of our corporate website: www.claytonutz.com.

Glossary: List of commonly used terms in international investment law

Glossary	
Term	Definition
Arbitration	A form of dispute resolution before of a privately appointed tribunal. Arbitration is subject to agreement by the parties.
Bilateral Investment Treaty (BIT)	An investment treaty between two countries. See 'Investment Treaty'.
Entry into force	The date that an investment treaty is given legal effect.
Expropriation	The act of a government seizing or taking private property without the consent of the owner. (See p 19.)
Fair and equitable treatment	A standard of treatment provided for by international investment treaties. (See p 18.)
Foreign Direct Investment (FDI)	The flow of capital, assets and other investments on a long-term basis by a resident-entity in one country into an enterprise in another country. (See p 4)
Free Trade Agreement (FTA)	An international agreement between two or more countries dealing with matters relating to investment, trade and other matters of commerce between the countries.
Home State	The investor's home country.
Host State	The country where the investment will be made.
ICSID	International Centre for Settlement of Investment Disputes (overseen by the World Bank)
ICSID Convention	The Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Glossary	
Investment	The placement of capital in a commercial activity with the expectation of profit being made from its use. The term 'investment' is specifically defined in most investment treaties. (See p 13.)
Investment treaty	An agreement between two or more countries seeking to encourage and protect foreign investments from one country into another country.
Investor	The person or legal entity who carries out the investment. The definition of 'investor' is specifically defined by most investment treaties. (See p 10.)
Local courts	The domestic courts of a country—often where the investment is made.
Most favoured nation treatment	The standard of protection provided by investment treaties requiring the host State to treat the foreign investor at least as well as it treats foreign investors of other countries. (See p 17.)
Multilateral Investment Treaty (MIT)	An investment treaty between three or more countries. For example, the Energy Charter Treaty is an MIT. (See p 9.)
National treatment	The standard of protection provided by investment treaties requiring the host State to treat the foreign investor at least as well as it treats its own domestic investors. (See p 17.)
Nationalisation	See 'expropriation'.

Glossary	
New York Convention	The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It provides for the enforcement of foreign arbitral awards in over 144 countries.
Political risk	The risk of loss occurring because of arbitrary government action.
Repatriate	The process of returning an investment to its home State (or country of origin).
Seat	Also called the place of arbitration. This refers to the legal, rather than physical, location of the arbitration proceedings. An arbitration legally exists under the legal framework of the seat of arbitration and any award rendered is deemed to be made in the seat.
Sovereign immunity	A principle in international law under which a State and its various organs and agencies can be immune from prosecution or civil proceedings.
Standards of protection	The obligations under the investment treaty that the host State must uphold in relation to its treatment of foreign investors and investments.
State owned enterprise	A company or other entity owned by a State.
Third country	A country that is not the 'host State' or the 'home State'.
UNCITRAL	The United Nations Commission on International Trade Law

List of BITs of Australia's major trading partners

		List of BITs of Australia's major trading partners & FDI recipients																
		(Green rows and columns indicate that the country has also entered into a BIT or FTA with Australia)																
State	Signatory to the ICSID Convention	List of BITs of Australia's major trading partners & FDI recipients																
		Canada	China	Germany	Hong Kong	India	Indonesia	Japan										
Afghanistan	✓			✓														
Albania	✓		✓	✓													✓	✓
Algeria	✓		✓	✓				✓										
Angola																	✓	
Antigua and Barbuda																	✓	
Argentina	✓	✓	✓	✓		✓	✓										✓	✓
Armenia	✓	✓	✓	✓		✓											✓	✓
Australia	✓		✓		✓	✓	✓											
Austria			✓		✓	✓												
Azerbaijan	✓		✓	✓													✓	✓
Bahamas	✓																	
Bahrain	✓		✓	✓		✓											✓	✓
Bangladesh	✓		✓	✓				✓									✓	✓
Barbados	✓	✓	✓	✓													✓	
Belarus	✓		✓	✓		✓											✓	✓
Belgium Luxembourg	✓		✓		✓	✓	✓										✓	
Belize	✓		✓														✓	
Benin	✓		✓	✓													✓	
Bolivia	◆		✓	✓													✓	✓

List of BITs of Australia's major trading partners (cont)

State	Signatory to the ICSID Convention	List of BITs of Australia's major trading partners & FDI recipients								(Green rows and columns indicate that the country has also entered into a BIT or FTA with Australia)							
		Canada	China	Germany	Hong Kong	India	Indonesia	Japan	Korea, (South) Republic of	Malaysia	Netherlands	New Zealand	Singapore	Switzerland	Thailand	United Kingdom	United States of America
Bosnia and Herzegovina	✓		✓	✓		✓				✓	✓		✓		✓		
Botswana	✓		✓	✓						✓			✓				
Brazil									✓		✓		✓		✓		
Brunei Darussalam	✓		✓	✓					✓								
Bulgaria	✓		✓	✓		✓	✓		✓		✓	✓	✓	✓	✓	✓	
Burkina Faso	✓			✓					✓	✓			✓				
Burundi	✓			✓						✓					✓		
Cambodia	✓		✓	✓			✓		✓	✓		✓	✓	✓			
Cameroon	✓			✓						✓			✓		✓	✓	
Canada	✓													✓			
Cape Verde			✓							✓			✓				
Central African Republic	✓			✓									✓				
Chad	✓			✓									✓				
Chile	✓		✓	✓			✓	✓	✓	✓	✓		✓		✓		
China	✓			✓		✓	✓		✓	✓	✓	✓	✓	✓	✓		
Colombia	✓												✓		✓		
Comoros	✓																
Congo	✓		✓	✓					✓				✓		✓	✓	
Congo, DR	✓		✓	✓					✓				✓			✓	

List of BITs of Australia's major trading partners (cont)

State	Signatory to the ICSID Convention	List of BITs of Australia's major trading partners & FDI recipients								(Green rows and columns indicate that the country has also entered into a BIT or FTA with Australia)									
		Canada	China	Germany	Hong Kong	India	Indonesia	Japan											
Costa Rica	✓	✓	✓	✓															
Côte d' Ivoire	✓		✓	✓															
Croatia	✓	✓	✓	✓		✓	✓								✓	✓	✓	✓	✓
Cuba			✓				✓								✓		✓		
Cyprus	✓		✓			✓													
Czech Republic	✓	✓	✓	✓		✓	✓							✓	✓	✓	✓	✓	✓
Denmark	✓		✓		✓	✓	✓												
Djibouti			✓			✓									✓				
Dominica																			
Dominican Republic	✓			✓											✓		✓		
Ecuador	◆	✓	✓	✓											✓		✓	✓	✓
Egypt	✓	✓	✓	✓		✓	✓	✓						✓	✓	✓	✓	✓	✓
El Salvador	✓	✓		✓											✓		✓	✓	✓
Equatorial Guinea			✓																
Eritrea															✓				
Estonia	✓		✓	✓											✓		✓	✓	✓
Ethiopia	✓		✓	✓											✓				
Fiji	✓																		
Finland	✓		✓			✓	✓								✓				

List of BITs of Australia's major trading partners (cont)

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		Canada	China	Germany	Hong Kong	India	Indonesia	Japan	Korea, (South) Republic of	Malaysia	Netherlands	New Zealand	Singapore	Switzerland	Thailand	United Kingdom	United States of America
France	✓		✓		✓	✓	✓		✓	✓				✓			
Gabon	✓		✓	✓									✓				
Gambia	✓												✓		✓		
Georgia	✓		✓	✓											✓		✓
Germany	✓		✓		✓	✓	✓		✓	✓				✓			
Ghana	✓		✓	✓			✓			✓			✓		✓		
Greece	✓		✓	✓			✓		✓								
Grenada	✓														✓		✓
Guatemala	✓			✓					✓				✓				
Guinea	✓		✓	✓						✓			✓				
Guinea-Bissau	✓																
Guyana	✓		✓	✓					✓				✓		✓		
Haiti	✓			✓											✓		✓
Honduras	✓			✓					✓				✓		✓		✓
Hong Kong									✓				✓	✓	✓		
Hungary	✓	✓	✓	✓			✓	✓		✓			✓	✓	✓		
Iceland	✓		✓														
India			✓						✓	✓			✓	✓	✓		
Indonesia	✓		✓	✓			✓			✓			✓	✓	✓		
Iran			✓						✓	✓			✓				

List of BITs of Australia's major trading partners (cont)

State	Signatory to the ICSID Convention	List of BITs of Australia's major trading partners & FDI recipients (Green rows and columns indicate that the country has also entered into a BIT or FTA with Australia)																
		Canada	China	Germany	Hong Kong	India	Indonesia	Japan	Korea, (South) Republic of	Malaysia	Netherlands	New Zealand	Singapore	Switzerland	Thailand	United Kingdom	United States of America	
Israel	✓		✓	✓		✓			✓	✓				✓				
Italy	✓		✓		✓	✓	✓											
Jamaica	✓		✓	✓			✓						✓		✓	✓		
Japan	✓		✓		✓							✓						
Jordan	✓		✓	✓			✓		✓	✓		✓	✓	✓	✓	✓	✓	
Kazakhstan	✓		✓	✓		✓			✓	✓			✓		✓	✓		
Kenya	✓		✓	✓						✓			✓		✓			
Korea, (North) Democratic Republic of			✓			✓	✓						✓	✓				
Korea, (South) Republic of	✓		✓	✓	✓		✓	✓		✓			✓	✓	✓			
Kuwait	✓		✓	✓		✓			✓	✓			✓					
Kyrgyzstan	✓		✓	✓		✓	✓			✓			✓		✓	✓		
Laos			✓			✓	✓			✓			✓	✓	✓			
Latvia	✓	✓	✓	✓								✓	✓		✓	✓		
Lebanon	✓	✓	✓	✓						✓			✓		✓			
Lesotho	✓			✓									✓		✓			
Liberia	✓			✓									✓					
Libyan									✓				✓					
Lithuania	✓		✓	✓					✓				✓		✓	✓		

List of BITs of Australia's major trading partners (cont)

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		Canada	China	Germany	Hong Kong	India	Indonesia	Japan	Korea, (South) Republic of	Malaysia	Netherlands	New Zealand	Singapore	Switzerland	Thailand	United Kingdom	United States of America		
Macedonia	✓		✓	✓															
Madagascar	✓		✓	✓									✓						
Malawi	✓																		
Malaysia	✓		✓	✓		✓	✓		✓				✓		✓				
Mali	✓			✓									✓						
Malta	✓			✓											✓				
Mauritania	✓			✓									✓						
Mauritius	✓		✓	✓		✓	✓					✓	✓		✓				
Mexico													✓		✓				
Micronesia	✓																		
Moldova	✓		✓	✓									✓		✓	✓			
Mongolia	✓		✓	✓		✓	✓	✓	✓			✓	✓		✓	✓			
Montenegro																			
Morocco	✓		✓	✓		✓	✓						✓		✓	✓			
Mozambique	✓		✓	✓			✓						✓		✓	✓			
Myanmar			✓																
Namibia	✓		✓	✓									✓						
Nepal	✓			✓											✓				
Netherlands	✓		✓		✓	✓	✓	✓	✓			✓		✓					
New Zealand	✓		✓		✓														

List of BITs of Australia's major trading partners (cont)

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		Canada	China	Germany	Hong Kong	India	Indonesia	Japan	Korea, (South) Republic of	Malaysia	Netherlands	New Zealand	Singapore	Switzerland	Thailand	United Kingdom
Nicaragua	✓			✓					✓		✓		✓		✓	✓
Niger	✓			✓									✓			
Nigeria	✓		✓	✓					✓		✓		✓		✓	
Norway	✓		✓				✓			✓						
Oman	✓		✓	✓		✓			✓		✓	✓			✓	
Pakistan	✓		✓	✓			✓	✓	✓	✓		✓			✓	
Panama	✓	✓		✓					✓		✓		✓		✓	✓
Papua New Guinea	✓		✓	✓					✓						✓	
Paraguay	✓			✓					✓		✓		✓		✓	
Peru	✓	✓	✓	✓					✓	✓	✓	✓	✓	✓	✓	
Philippines	✓	✓	✓	✓		✓	✓		✓		✓		✓	✓	✓	
Poland		✓	✓			✓	✓		✓	✓		✓	✓	✓	✓	✓
Portugal	✓		✓	✓		✓			✓							
Qatar			✓			✓	✓		✓				✓			
Romania	✓	✓	✓	✓		✓	✓		✓	✓			✓	✓	✓	✓
Russia	✓	✓	✓	✓		✓			✓		✓		✓	✓	✓	✓
Rwanda	✓			✓									✓			✓
Saint Kitts & Nevis	✓															
Saint Lucia	✓														✓	

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